



DEVELOPMENTS IN DEFENSE PROCUREMENT LAW: EUROPE AND THE UNITED STATES

OCTOBER 19 & NOVEMBER 9
9 AM ET / 14:00 UK / 15:00 CET

Welcome

Christopher Yukins
GW Law School

- Recording and materials at www.publicprocurementinternational.com
- Questions – please use chat (not Q&A)
- All panelists' statements are in their personal capacities



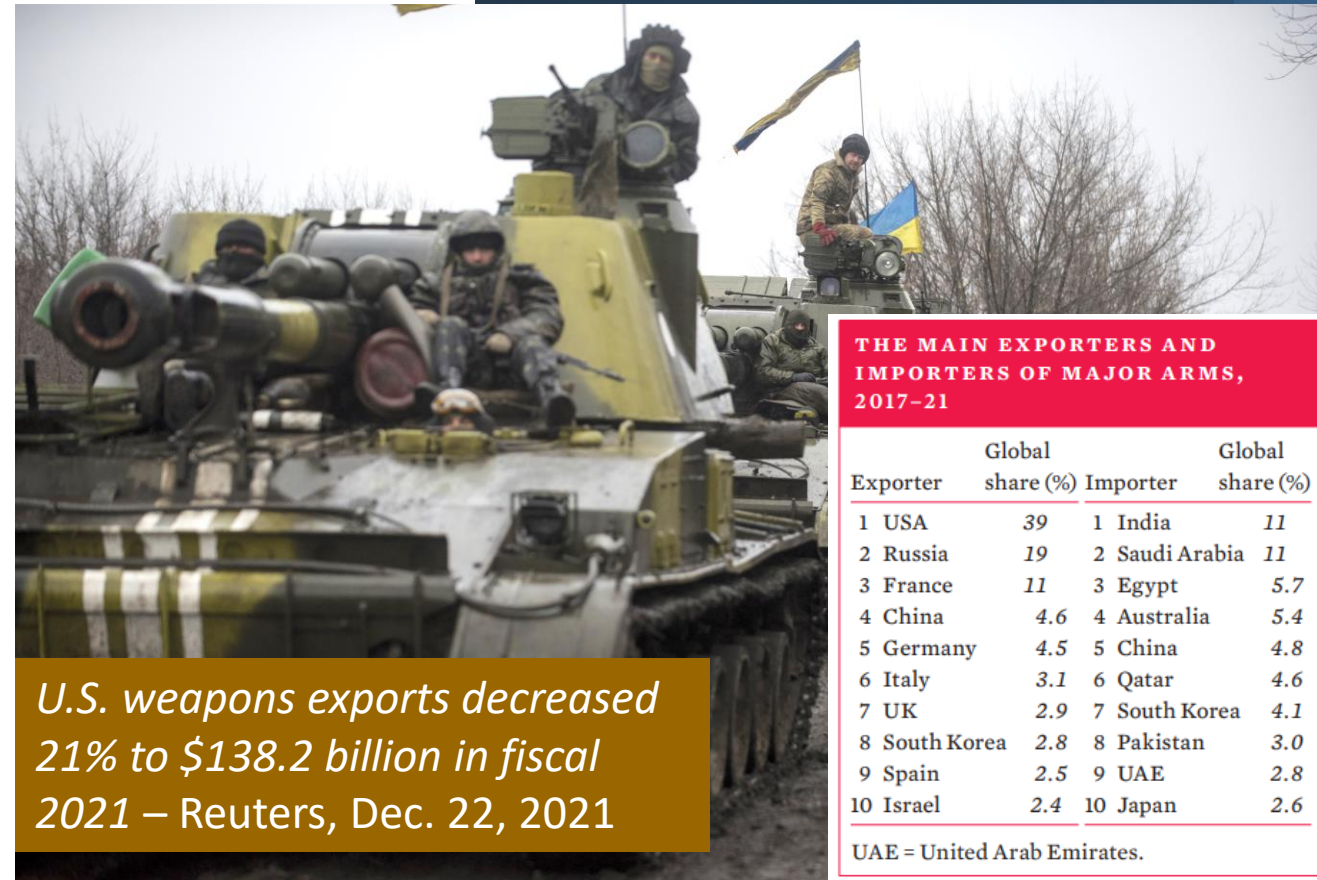
Goal of Today's Session –
Identify key legal issues in U.S.
defense procurement, in light of
war in Ukraine

Christopher Yukins
GW Law School



U.S. Security Assistance to Ukraine

- From 2014, when Russia first invaded Ukraine, the **United States has provided more than \$20.3 billion in security assistance to Ukraine**; of this, the Biden Administration has committed about \$17.6 billion in security assistance since the start of the 2022 war.
- Especially since 2021, the United States has been **providing defense items to Ukraine via Presidential Drawdown Authority (PDA)**, by which the President can authorize the immediate transfer of articles and services from U.S. stocks, up to a funding cap established in law, in response to an “unforeseen emergency” (22 U.S.C. §2318(a)(1)). Since August 2021, the Biden Administration has authorized 23 drawdowns valued at \$10.6 billion
- Ukraine has used FMF [Foreign Military Financing]**, as well as some of its national funds, to procure U.S. defense equipment, including Javelin anti-armor missiles and Mark VI patrol boats purchased through the **Foreign Military Sales (FMS) system**.





Charles Blanchard



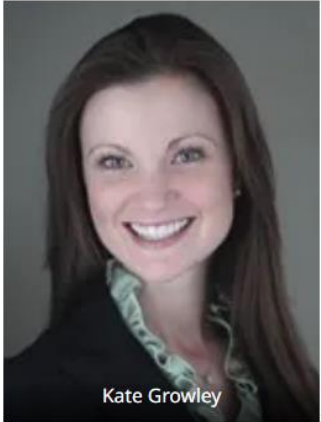
Larry Boles



Michael Bowsher KC



Allen Green



Kate Growley



Marques Peterson



Lorraine Fredericks Romero



Daniel Schoeni



Christopher Yukins
Professor of Government
Contracts Law

Christopher Yukins

Moderators and Panelists

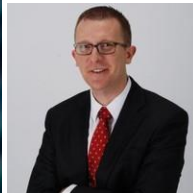
Moderators' Introductory Comments



Michael Bowsher KC – Perspectives on U.S. defense procurement



Allen Green – Historical precedents for legal cooperation



Daniel Schoeni – Transatlantic defense cooperation

U.S. Technology/Acquisition Controls

Charles Blanchard – Arnold & Porter

Background

- Increasing concern that China is gaining a technological edge on the use through its investments in US companies and its technology transfers from the US.
- The response has been a significant expansion of foreign investment reviews by the Committee of Foreign Investment in the United States (“CFIUS”) and a more aggressive use of the Department of Commerce’s export controls

CFIUS

- CFIUS is the regulatory system used by the US to review foreign investment in the US. In response to concerns about China, Congress recently strengthened the law. The major changes were (1) to expand CFIUS authority even to certain minority investments when there is a danger of access to critical technology, personal information about US persons and access to critical infrastructure, and (2) for the first time, a CFIUS filing for some transactions is mandatory.
- The result has been an increase in filings and a more aggressive “look back” by CFIUS at transactions that did not receive review.
- Chinese and Russian companies have not been allowed to invest in sensitive US companies.



U.S. Technology/Acquisition Controls

Charles Blanchard – Arnold & Porter

Export Controls

- In addition to the normal export control system that will be discussed later, Commerce has the ability to place entities on a “Entity List” that requires a license for the export of even otherwise uncontrolled technology to persons and entities on the list. In addition, Commerce has adopted a “Foreign-Direct Product” rule. According to this rule, a foreign-produced item located outside the United States is subject to U.S. export control rules if it is a “direct product” of specified “technology” or “software,” or is produced by a plant or “major component” of a plant that itself is a “direct product” of specified “technology” or “software.” This greatly expands the effect of US export controls.
- These tools were used against Chinese telecommunications firm Huawei to great effect

Recent Developments

- The enhanced export controls have been used against Russia. The US applied these tools against semiconductors, computers, lasers, and aerospace sectors, among others. The US has effectively cut off all Russian airlines from US technology,
- These tools have also been used against China, with a focus on high-end semiconductor technology. Given the Foreign-Direct Product rule, even semiconductors made overseas are subject to restriction if they are manufactured using US technology—which is almost always the case.



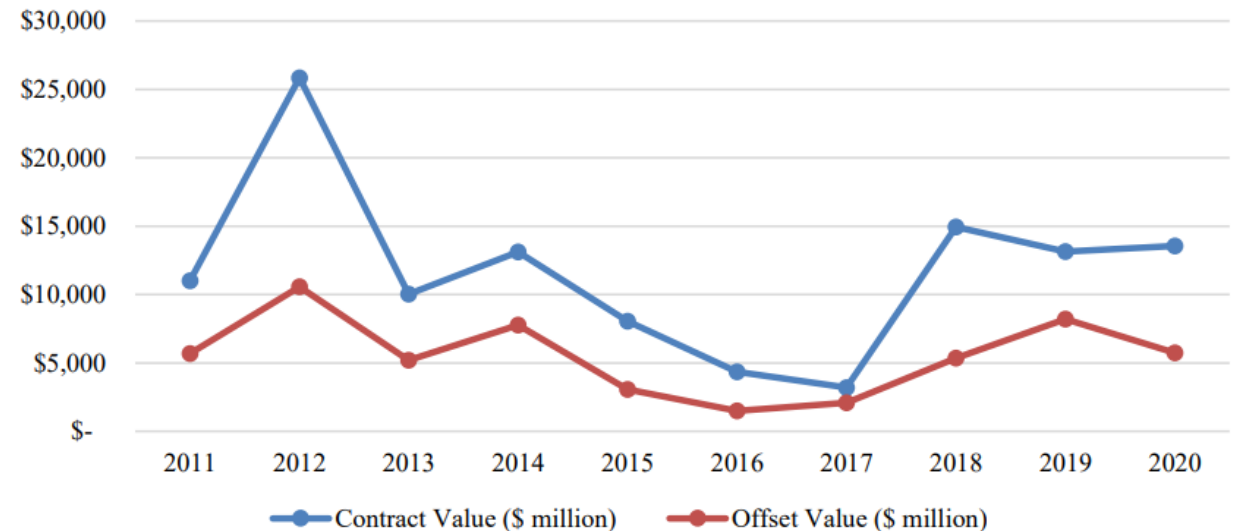
Offsets

Larry Boles – Teledyne FLIR

- Range of industrial and commercial compensation practices provided to foreign governments and firms as inducements or conditions for the purchase of military goods and services
- Unavoidable transaction cost v. loss of US jobs
 - U.S. defense contractors consider offsets an unavoidable reality of export sales; U.S. second tier suppliers worry over lost sales
- Direct vs. Indirect Offsets
- Emerging Issues – Article 346 of the TFEU and Russian aggression



Chart 2-1: Overview of Defense Export Sales Contract Values and Related Offset Agreements Values in Last Ten Years (2011 - 2020)



Kate M. Growley – C&M International

Cybersecurity Challenges in Procurement Process

- Cybersecurity v. traditional factors of schedule, cost, and performance
 - Should cybersecurity be foundational or weighed against other factors?
- Supply chain security
 - Should the customer or the prime manage cybersecurity down the supply chain?
 - Should this cover vendors, as well as subcontractors?
- “Dynamic” cybersecurity
 - Should cybersecurity requirements be a snapshot in time?
 - Or should compliance turn on continuous monitoring?





Kate M. Growley – C&M International

Evolving Approach in the United States

- At least “basic” cybersecurity required for all contractors handling sensitive information
- Department of Defense leading on supplemental frameworks
 - Requiring self-attestations of “adequate security” for more sensitive information
 - Rolling out (mostly) third-party assessment program
- Other US agencies watching and tweaking their approaches over time
- Other countries also monitoring for “lessons learned”
 - Especially on reciprocity with international standards like ISO 27001

Foreign Military Sales

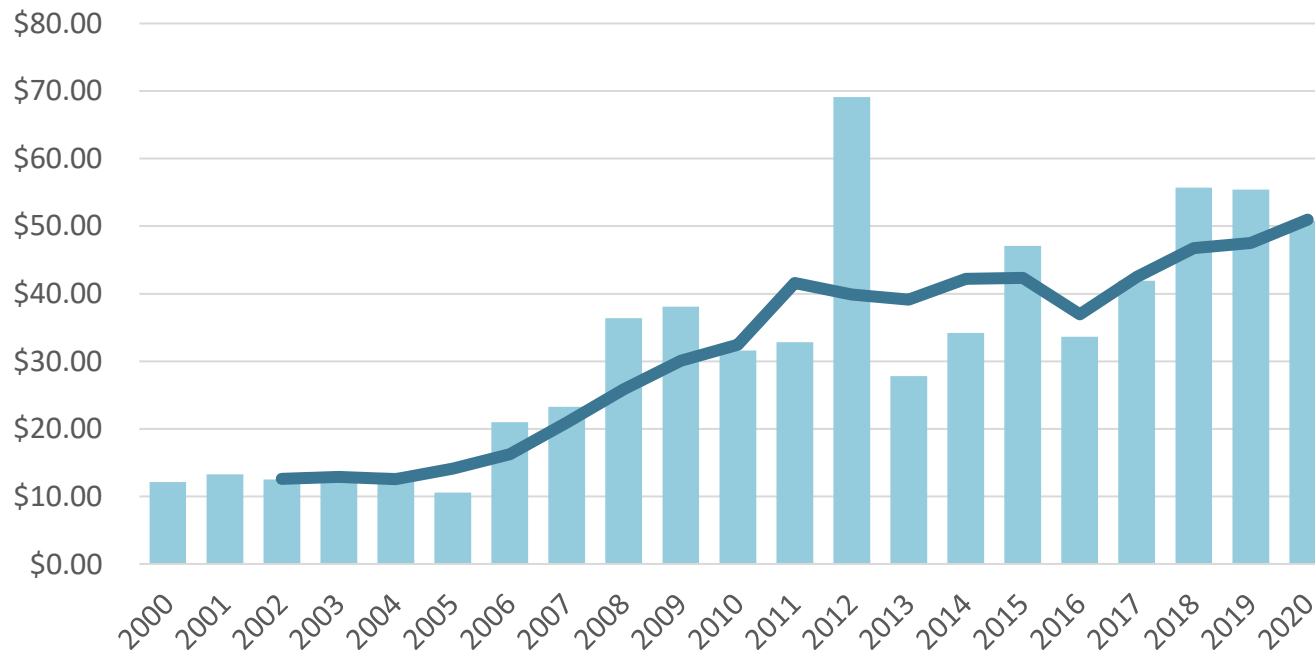
Marques O. Peterson



FY 2000-2020 Security Assistance Sales

Marques Peterson - Pillsbury

Security Assistance Sales: Three-Year Rolling Average
(Billions)



FY 2020

FMS: \$44.79B

FMF: \$3.30B

BPC: \$2.69B

Total: \$50.78B

FY 2020 totals represent a continued, growing sales trend since FY2000

Data Source: 1200 System/DSAMS



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Foreign Military Sales

Marques O. Peterson - Pillsbury

- Security Cooperation/Security Assistance Background
- Foreign Military Sales Program
- The Foreign Military Sales Process
- Executing a Foreign Military Sale
- Miscellaneous FMS Issues
- Foreign Military Sales - Violations
- Direct Commercial Sales
- Key Emerging Issues



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U.S. TRADE CONTROLS

WHAT THE INTERNATIONAL PRACTITIONER NEEDS TO KNOW

Lorraine (Lori) Romero, Director – Trade Counsel
L3Harris Technologies, Inc.



Exporting from the United States – the Basics

Lorraine Romero – L3Harris Technologies



Regulatory Structure

- International Traffic In Arms Regulations (ITAR) govern the export and temporary import of Defense Articles
- ITAR also controls the re-transfer and re-export of controlled goods (extraterritorial reach)
- Defense Articles include hardware, software, technical data, and services described on the United States Munitions list, which closely mirrors conventional weapons elements of the Wassenaar Arrangement signed by 42 member countries
- Where no license exemption exists, a license to export or market for export controlled Defense Articles must be obtained from the U.S. Department of State, Directorate of Defense Trade Controls (DDTC)
- State maintains a policy of denial for individuals and entities subject to sanctions or other export prescriptions (denied parties screening is essential for compliance) though State has granted limited licenses in furtherance of assistance to the Ukraine (e.g. outfitting Turkish drones with ITAR-controlled sensors and targeting systems)
- MISSION of DDTC: Assure that commercial exports of defense articles and defense services advance U.S. National Security and foreign policy objectives
- Export Authorization Regulations (EAR) govern the export of dual use commodities included in the Wassenaar Arrangement
- EAR does not exert extraterritorial control over re-transfer or re-export
- U.S. Department of Commerce is the regulatory authority for exports under the EAR
- EAR includes several general licenses for low risk export transactions and includes countries where no license is required for export of EAR controlled goods and services



Current Issues

Lorraine Romero – L3Harris Technologies



US Persons performing Defense Services abroad

- Defense Services under the ITAR are: furnishing assistance in the design, development, testing, engineering, manufacture, production, assembly, modification, operation, demilitarization, destruction, processing or use of defense articles
- DDTC updated its FAQs regarding this subject on September 6, 2022
- Currently US Persons must request authorization by General Correspondence pursuant to ITAR Section 126.9(b) but need not individually register
- Authorization is valid for 4 years
- Process currently raises privacy concerns in several jurisdictions as it requires submission and retention of Personal Data by the US Government and potentially an employer assisting in the submission
- On September 7, 2021, three former U.S. intelligence officials/military personnel entered into a settlement with DDTC/DOJ regarding the unauthorized provision of cyber services to the U.A.E. government

ITAR Update and Reorganization

- On March 23, 2022, DDTC updated, reorganized the ITAR and published new Open General Licenses under an Open General License Pilot Program – both effective in September of 2022
- OGLs facilitate legitimate defense trade under Australia and UK defense trade cooperation treaties and the Canadian Controlled Goods program
- OGLs authorize the re-transfer of ITAR controlled goods and services to authorized end-users in Canada, the U.K., and Australia
- Practitioners should assure that their templates for Agreements and training are updated to align to new sections numbers



Questions & Discussion



Questions for Panel

- What special issues have you seen arise in defense procurement since Russia's invasion of Ukraine?
- What issues should be addressed first, as lawyers and agencies sort out legal cooperation in the U.S.-European defense markets?
- Could at least some issues – some barriers – be sorted out in the context of trade discussions?
- Do different languages and legal traditions raise barriers to effective cooperation in international defense markets?

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